STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2006
v	No. 261217 Wayne Circuit Court
EARLAND JAMES COLLINS, Defendant-Appellant.	LC No. 04-009868-01

Before: Whitbeck, C.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

A jury convicted defendant Earland James Collins of assault with intent to rob while armed,[1] attempted first-degree home invasion,[2] and possession of a firearm during the commission of a felony (felony-firearm).[3] The trial court sentenced Collins as a second habitual offender[4] to serve concurrent terms of 15 to 30 years' imprisonment for the assault conviction and 2 to 5 years' imprisonment for the home invasion conviction. Both of these sentences were to run consecutive to a mandatory two-year sentence for the felony-firearm conviction. Collins appeals as of right. We affirm. We decide this appeal without oral argument.[5]

I. Basic Facts And Procedural History

Between 7:00 and 7:15 a.m. on September 15, 2004, complainant Martha Debusschere was outside her home in Detroit. She was in the process of removing debris from around her house when a man came up behind her, carrying a gun. The man told Debusschere not to scream and asked her if she had any money. Debusschere testified that the gun was "a handgun and it was black – black like the police use." The man and Debusschere went to the side of house, and when they were about five feet from the door on the side of the house, the man told Debusschere

[1] MCL 750.89.

[2] MCL 750.110a(2); MCL 750.92.

[3] MCL 750.227b.

[4] MCL 769.10.

[5] MCR 7.214(E).

to open her door or else he would shoot her. Debusschere had locked her door before coming outside and did not unlock the door when the man requested her to. Instead, she ran away from the man into the street in front of her house.

Once in the street, Debusschere saw her neighbor, 14-year-old Deandre Smith, and told him that a man with a gun had threatened her. Smith saw a man walking through Debusschere's grass, putting a gun in his pocket. He also stated that the man was wearing a "black and red Trail Blazer jersey, with black pants." Smith further testified that the jersey the man was wearing also had a little bit of white on it as well. Smith and Debusschere went to Smith's house, where Smith's mother called the police.

Detroit Police Officers Alan Johnson and Anthony Avecilla responded to a dispatch directing them to investigate a complaint regarding a person with a weapon. The officers arrived approximately ten minutes after Debusschere encountered the man in her yard. Officer Johnson testified that when spoke with Debusschere, she was "very excited, very nervous, and … stuttering very badly." Debusschere described to Officer Johnson the man with the gun as a "black male wearing all black." Officer Johnson admitted her description was very vague but Debusschere did indicate to him that she would be able to "I.D. him -- I.D. the face." Officer Avecilla obtained a description of the man from Smith's mother (Smith had since left for school). Based on the information she had received from her son, Smith's mother described the man as a black male, about six feet two inches tall, with a dark complexion, and wearing "a red, black, and white Blazer's jersey with black pants."

Once Officers Johnson and Avecilla had obtained descriptions of the man, they began canvassing the area. Officers Johnson and Avecilla located a man walking in the area who matched the description. The man, identified as defendant Earland Collins, was wearing a Trial Blazers jersey. The officers searched Collins but did not recover a firearm from him. The officers arrested Collins based on outstanding traffic warrants.

II. Other-Acts Evidence

A. Standard Of Review

Collins argues that the trial court improperly admitted other-acts evidence because the prosecutor presented it only to show Collins' propensity to commit a crime. We review for an abuse of discretion a trial court's admission of evidence.[6] However, when "admission of evidence involve[s] preliminary questions of law such as whether a rule of evidence or statute precludes admissibility," appellate review is de novo.[7] Under such a review, an abuse of discretion exists if the evidence is inadmissible as a matter of law.[8]

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[6] *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006).

[7] *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

[8] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

B. Similar Scheme Or Plan

The Michigan Rules of Evidence prohibit evidence of "other crimes, wrongs, or acts" from being admitted "to prove the character of a person in order to show action in conformity therewith."[9] Evidence of other acts may be admitted, though, for "other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material."[10]

Our Supreme Court has adopted a three-step approach to "employ[] the evidentiary safeguards already present in the rules of evidence."[11] Other-acts evidence is admissible if (1) it is offered for a proper purpose, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not substantially outweighed by the danger of unfair prejudice.[12] "A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense."[13] Additionally, the trial court may provide a limiting instruction.[14]

The prosecution proposed that the other-acts evidence be admitted for the proper purpose of showing a similar scheme and plan. The prosecution argued that Collins' similar plan was to take advantage of elderly people. However, simply proposing evidence for one of the purposes enumerated in MRE 404(b) is not all that is needed for other-acts evidence to be admissible.[15] The other-acts evidence must also be relevant to be admissible.[16] Relevant evidence is that which has "any tendency to make the existence of any fact [regarding the issue] more probable or less probable."[17] If the only fact that can be proven by the evidence is relevant only to the defendant's character, then the evidence must be excluded.[18]

An established common plan or scheme can be relevant when it allows the jury to "consider evidence that the defendant used that [plan or scheme] in committing the charged act as proof that the charged act occurred."[19] Other acts may be "logically relevant to show that the charged acts occurred where the [other acts] and the charged [acts] are sufficiently similar to

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[9] MRE 404(b)(1).

[10] *Id.*

[11] *People v Sabin* (*After Remand*), 463 Mich 43, 55; 614 NW2d 888 (2000).

[12] *Id.* at 55-56;

[13] *People v Magyar*, 250 Mich App 408, 414; 648 NW2d 215 (2002).

[14] *Sabin*, *supra* at 56; see MRE 105.

[15] *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998).

[16] *Sabin*, *supra* at 55; see MRE 402.

[17] MRE 401.

[18] *Crawford*, *supra* at 385.

[19] *Sabin*, *supra* at 63-64 n 10.

support an inference that they are manifestations of a common plan, scheme, or system."[20] However, the similarity between the other acts and charged acts must be such that it "'demonstrate[s] circumstantially that the defendant committed the charged offense pursuant to the same design or plan.'"[21]

Donald Bannasch testified regarding an incident that occurred on September 13, 2004, two days before Debusschere's incident. Bannasch testified that around 8:00 a.m. he was taking garbage out of his garage when a man ran into the garage, tackled him, and demanded money while brandishing a gun. Bannasch acknowledged that in his testimony in a separate case involving this incident, he stated the gun "looked like a black revolver." After the man discovered Bannasch did not have any money, "he wanted to go into the house." Once inside the house, the man took Bannasch's watch and some money out of envelopes Bannasch had received for his 78th birthday. The man then asked Bannasch where his money was, and Bannasch took him into the bedroom. In the bedroom, Bannasch gave the man his money out of his wallet, and the man also took pocket change and jars full of quarters. After the man went into the garage to recover keys to Bannasch's car, Bannasch grabbed his own gun and fired two shots at the man as the man ran out of Bannasch's house. Bannasch indicated in a photo array and during testimony that the man he had the encounter with was Collins.

Collins attempts to downplay the similarities between Debusschere and Bannasch by pointing out the 24-years' difference in age between the two. Collins argues that this age difference discounts the prosecution's attempt to show a common plan or scheme in which Collins took advantage of elderly people because Debusschere's age of 63 is "hardly elderly." Collins' argument, however, does not take into consideration the perception that older people are more vulnerable because they are more likely to not have the physical ability to ward off an assault by an armed person who much younger. Debusschere and Bannasch were also similar in that they both lived alone and were by themselves at the time of Collins' assaults. The alleged victims had similar characteristics that could give rise to an inference of a common plan or scheme.

Additionally, the other-acts testimony was relevant to establishing a common plan or scheme because it showed the method of Collins' assault on Debusschere was similar to his assault on Bannasch. Both assaults involved Collins demanding money from the victims outside their homes in the early morning and then threatening to shoot them if they did not allow him inside their homes. Collins again attempts to distinguish the two acts by arguing that the incidents are not similar because Bannasch was taking trash to his garage while Debusschere was outside picking up debris. Collins also asserts that Bannasch's home is located in a "small suburban community" while Debusschere lives in a "city of more than 900,000 people." However, our Supreme Court has rejected a "standard of high degree of similarity between the

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[20] *Id.* at 64.

[21] *Id.* at 66, quoting *People v Ewoldt*, 7 Cal 4th 380, 403; 27 Cal Rptr 2d 646; 867 P2d 757 (1994).

proffered other acts of the defendant and the charged acts."[22] Other-acts evidence "needs only to support the inference that the defendant employed the common plan in committing the charged offense."[23] Bannasch's testimony provided strong support for the inference that Collins was employing his common scheme of assaulting older individuals outside their homes at gunpoint. As a result, the other-acts evidence was relevant to the issue of Collins' guilt in the charged acts perpetrated against Debusschere.

Finally, the other-acts evidence must not be unfairly prejudicial.[24] Unfair prejudice results when "marginally probative evidence will be given undue or preemptive weight by the jury."[25] Evidence showing a common scheme or plan can circumstantially lead to an inference that the charged act was committed when the defendant committed the act in accord with such scheme or plan. We find that the value of Bannasch's testimony was more than marginally probative and not substantially outweighed by the risk of prejudice.

In addition to being probative of Collins' commission of the charged acts, the prosecution also argues that Bannasch's testimony was probative of Collins' intent. Although the prosecutor did not argue the purpose of showing Collins intent at the trial court level, we may still consider the relevance of the evidence under this additional purpose.[26] All elements of a charge are at issue when a defendant makes a general denial of the charge.[27] The specific intent element of attempted first-degree home invasion requires "intent to commit a felony, larceny, or assault in the dwelling."[28] Therefore, by showing that Collins entered Bannasch's house with the intent to commit larceny, the prosecution could prove circumstantially that Collins possessed a similar intent when he demanded to be let into Debusschere's house. This additional probative value of Bannasch's testimony further endorses the trial court's decision to admit the evidence.

Once the trial court determines that the probative value is greater than the prejudicial risk posed by the evidence, the trial court should provide a jury instruction "advising the jurors that they are to consider the other acts evidence only as indicative of the reasons for which the evidence is proffered to cushion any prejudicial effect."[29] In this case, the trial court provided such sufficient instruction. Therefore, we conclude that the trial court properly admitted the other-acts evidence.

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[22] *People v Knox*, 469 Mich 502, 510; 674 NW2d 366 (2004); *People v Hine*, 467 Mich 242; 650 NW2d 659 (2002).

[23] *Hine*, *supra* at 253.

[24] *Crawford*, *supra* at 398.

[25] *Id.*

[26] *Sabin*, *supra* at 59 n 6 (stating the "prosecution's recitation of purposes at trial does not restrict appellate courts in reviewing a trial court's decision to admit the evidence").

[27] *Id.* at 60.

[28] MCL 750.110a(2).

[29] *People v Martzke*, 251 Mich App 282, 295; 651 NW2d 490 (2002).

III. Identification

A. Standard Of Review

Collins argues that the trial court should not have admitted Debusschere's photographic array identification at trial because it was improperly suggestive and vulnerable to misidentification. A trial court's "decision to admit identification evidence will not be reversed unless it is clearly erroneous."[30] "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made."[31]

B. Suggestiveness

"A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification."[32] Showing a victim or complainant a single photograph before submitting the individual to a photo array is "highly suggestive."[33] Collins' claim that the police showed Debusschere an individual photograph of Collins before giving her the full photographic array is based on Collins' interpretation of Debusschere's testimony from the preliminary examination. When asked at a *Wade*[34] hearing about her answer at the preliminary examination to the question whether she was "ever shown an individual picture of [Collins]," Debusschere clarified her response by stating, "I said yes, but I was confused." Debusschere then explained that the questioning attorney "didn't explain to [her] if it was a single picture." Debusschere stated that she was not shown a picture of Collins before the photo array. The police officer who conducted the procedure also maintained that he did not show Debusschere any of the photos outside of the photo array. This testimony refutes Collins' claim that Debusschere was shown a picture of him before the photographic array was conducted. Therefore, there was nothing suggestive about the photographic array that would have led the trial court to believe it should have excluded the identification evidence.

Additionally, Collins' claim that Debusschere selected two individuals at the photographic array is unsupported by the facts. The identification record provided the comments that Debusschere made when viewing the photographic array. The police officer testified as follows regarding Debusschere choosing Collins' picture from the photographic array:

> [Debusschere] was referring to number four and five in the array. Her comment was, one of these, this one or that one. She wasn't sure. First she started pointing back and forth.… She was a bit confused and referring to number five, Mr. Collins, she then said, I think it's this one. Then she said, it's number five.

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[30] *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

[31] *Id*.

[32] *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998).

[33] *Id.*

[34] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

Debusschere also testified that she was sure that the man she pointed to was the man that had assaulted her. This testimony shows that Collins' claim that Debusschere identified two men during the photographic array is unsubstantiated. The trial court did not err in concluding that the photo identification procedure "was not unduly suggestive … or wasn't flawed so as to deny the defendant his due process of law."

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder